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No. 95-770

In the Supreme Court of the United States

OCTOBER TERM, 1995

PAGE KILDAY TINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's jury instructions on the elements of money laundering were defective because they did not define the knowledge element of 18 U.S.C. 1957, and because they did not define the words "proceeds" and "promote," as used in 18 U.S.C. 1956(a)(1)(A)(i).

2. Whether the evidence was insufficient to support petitioner's convictions for money laundering under 18 U.S.C. 1956(a)(1)(A)(i) and 1957 because the government failed to show that the funds used in the pertinent financial transactions were derived from criminal activity, as required by both statutes, or that the transactions "promoted" the carrying on of a specified criminal activity, as required by Section 1956(a)(1)(A)(i).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is unreported, but the judgment is noted at 64 F.3d 664 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1995. A petition for rehearing was denied on September 25, 1995. Pet. App. 23a. The petition for a writ of certiorari was filed on November 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on 12 counts of mail fraud, in violation of 18 U.S.C. 1341; 23 counts of laundering monetary instruments, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and six counts of engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. 1957. She was sentenced to 51 months' imprisonment, to be followed by a three-year term of supervised release. The jury also returned a verdict forfeiting two real properties belonging to petitioner and her husband that were traceable to the unlawful activity. Pet. App. 4a-5a. The court of appeals affirmed. *Id.* at 1a-22a.

1. The evidence at trial showed that petitioner was responsible for the overall management of Lifecare Medical Sales and Rental, a medical equipment business in Greenville, Tennessee, owned by her husband, co-defendant Philip Tino. Petitioner's responsibilities included ordering supplies and equipment, corresponding with Medicaid, paying bills, and dealing with customers. Pet. App. 2a.

Lifecare entered into a contract with the Medicaid Division of the Tennessee Department of Health and Environment to provide Medicaid recipients with medical supplies. Under the terms of the contract, Lifecare was required to submit an authorization form to Medicaid listing the supplies needed for a particular patient; after Medicaid approved the request for supplies, Lifecare was to deliver the supplies to the patient and submit a claim to Medicaid for payment. Medicaid would then mail a weekly

payment check along with remittance advices stating which claims were being paid by the check. Pet. App. 2a.

A 1991 Medicaid audit of Lifecare revealed that the company had engaged in a scheme to defraud Medicaid, principally by seeking reimbursement from Medicaid for supplies that were never delivered. The auditors also found that Lifecare had improperly billed supplies under the wrong procedure codes to maximize its reimbursement. In addition, the audit revealed evidence of missing delivery tickets, altered dates, items arbitrarily added to delivery tickets, and claims submitted before delivery of the equipment. Pet. App. 3a.

Once Lifecare received Medicaid reimbursement checks, including those that had been fraudulently obtained, it deposited those checks into a checking account at Sovran Bank. On 23 occasions from July 1989 to December 1990, Lifecare wrote checks of less than $10,000 on the Sovran account to pay for business-related expenses, such as utilities, rent, equipment, and supplies. On six additional occasions during that period, Lifecare wrote checks in excess of $10,000 on the Sovran account to pay suppliers and, in two instances, to make down payments on purchases of real property. Pet. App. 4a, 12a.

2. Petitioner was convicted on, among other things, 23 counts of laundering monetary instruments, in violation of 18 U.S.C. 1956(a)(1)(A)(i). That Section punishes anyone who, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity * * * with the

intent to promote the carrying on of specified unlawful activity." She was also convicted on six counts of engaging in monetary transactions in violation of 18 U.S.C. 1957(a), which punishes one who "knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity." In both statutes, the term "specified unlawful activity" is defined to include the federal offense of mail fraud. See 18 U.S.C. 1956(c)(7)(A) (defining term by reference to 18 U.S.C. 1961(1), which in turn refers to 18 U.S.C. 1341); 18 U.S.C. 1957(f)(3) (same). The term "criminally derived property," used in Section 1957, is defined to mean "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. 1957(f)(2).

On appeal, petitioner contended that the evidence was insufficient to support her money laundering convictions. She argued that the evidence failed to show that she knew that the checks that she drew on the Sovran account represented the proceeds of the fraud scheme rather than the proceeds of Lifecare's legitimate business. The court of appeals rejected that contention, observing that it "ignores the compelling circumstantial evidence of knowledge." Pet. App. 10a. The court held that the circumstantial evidence was sufficient for the jury to find, beyond a reasonable doubt, that petitioner "knew that every payment from Medicaid represented in whole, or in part, payment for false claims and, therefore, every check drawn on the account, in whole or part, involved the proceeds." *Id.* at 11a.

Petitioner further argued that the government had failed to trace the funds involved in the financial

transactions (*i.e.*, the checks drawn on the Sovran account) to the fraudulently obtained Medicaid payments. The court of appeals held that the government was not required to trace the funds to specific underlying unlawful transactions. It observed that "to hold otherwise would permit participants in unlawful activities to prevent conviction simply by commingling funds." Pet. App. 11a-12a. The court concluded that the illicit source of the withdrawn funds was sufficiently established by the evidence showing "which checks from Medicaid in payment of fraudulent claims were deposited into the account, when the checks were deposited, any intervening transactions (through the account statements), and when the funds were withdrawn and in what amounts." *Id.* at 12a.

The court of appeals also rejected petitioner's claim that the evidence failed to show that she intended to "promote" the mail fraud scheme, within the meaning of Section 1956(a)(1)(A)(i), by using the proceeds of the false claims to pay for Lifecare's rent and utilities. The court explained that petitioner's intent to "promote" the mail fraud scheme could properly be inferred from the fact that "plowing the proceeds of the mail fraud back into the business permitted the Tinos to submit more false claims to Medicaid." Pet. App. 12a.

Finally, petitioner contended that the district court erred in failing to instruct the jury on the meaning of the terms "promote" and "proceeds" in Section 1956(a)(1(A)(i), and failed to give a proper instruction on the knowledge requirement of Section 1957. The court of appeals summarily rejected those claims, stating that they were not properly preserved at trial and that the instructions given "fairly apprised the jury of the elements of the offenses." Pet. App. 15a.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the district court failed to instruct the jury properly on the knowledge element of Section 1957, and that the court should have defined the terms "proceeds" and "promote," as used in Section 1956(a)(1)(A)(i). Petitioner did not request jury instructions on those points, nor did she object to the instructions given on the grounds now asserted. Accordingly, her contention may be reviewed only for plain error. Fed. R. Crim. P. 30, 52(b); see generally *United States* v. *Olano*, 113 S. Ct. 1770 (1993).

a. To prove a violation of Section 1957, the government must show that the defendant engaged in a financial transaction in property (having a value in excess of $10,000) derived from specified unlawful activity, with knowledge that the property was criminally derived. See *United States* v. *Lovett*, 964 F.2d 1029, 1041 (10th Cir.), cert. denied, 113 S. Ct. 169 (1992). In this case, the district court, tracking the language of the statute, expressly instructed the jury that Section 1957 applies to any person who "*knowingly* engages or attempts to engage in a monetary transaction in criminally derived property." 10 Tr. 126 (emphasis added) (reprinted at Gov't C.A. Br. App. A). That instruction adequately informed the jury of Section 1957's knowledge requirement.

Petitioner invokes cases such as *Staples* v. *United States*, 114 S. Ct. 1793 (1994), for the proposition that the district court must instruct the jury on the pertinent scienter element of an offense. See Pet. 7. In this case, however, the district court instructed the jury on that element. Moreover, contrary to petitioner's suggestion (*ibid.*), this Court has not held

that the district court's failure to instruct the jury on scienter is invariably plain error. See *United States* v. *Gaudin*, 115 S. Ct. 2310, 2322 (1995) (Rehnquist, C.J., concurring).

b. Section 1956(a)(1)(A)(i), which the district court read verbatim to the jury in its charge, makes it a crime, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] * * * such a financial transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity." 10 Tr. 128 (reprinted at Gov't C.A. Br. App. A). The statute does not define either "proceeds" or "promote." Petitioner, however, offers no basis for concluding that the statute employs either term in anything but its ordinary, everyday sense—"proceeds" to mean the return on a transaction and "promote" to mean encourage or advance. Both terms are within the comprehension of the average juror. Accordingly, the district court's failure to define the terms further was not plain error.

Petitioner suggests that courts have adopted varying definitions of "proceeds" (see Pet. 7 n.1), and therefore the district court should have defined that term for the jury. The courts that have considered the meaning of the term, however, have all "adopted dictionary definitions that define the term broadly," *United States* v. *Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), to include (for example) letters of credit as well as money (*ibid.*). The money involved in this case fits squarely within the standard definition of the term "proceeds," and there is no reason to doubt that the jury understood the term to have that meaning.

2. Petitioner contends that the evidence is insufficient to support her convictions for money laundering. She first argues (Pet. 8-12) that the evidence failed to show that she used the proceeds of her fraudulent scheme to "promote" the carrying on of that scheme, as required by Section 1956(a)(1)(A)(i). She also argues (Pet. 12-14) that the government failed to prove that the funds employed in the financial transactions were "proceeds" of unlawful activity, within the meaning of Section 1956, or "criminally derived property," within the meaning of Section 1957. Both contentions are without merit.

a. The evidence showed that petitioner and her husband plowed the proceeds of their Medicaid fraud back into Lifecare by using them to pay business expenses such as rent and utilities. As the court of appeals explained, those expenditures "promoted" the fraudulent scheme in that they "enabled the submission of more false claims to Medicaid by continuing the operation of the business." Pet. App. 12a.

Petitioner argues that Section 1956(a)(1)(A)(i) is not directed at "the payment of routine expenses by a company * * * engaged in legitimate business operations" (Pet. 9), and that the government must show that the proceeds of unlawful activity were plowed back into "an inherently unlawful venture" (Pet. 10). The statute does not require, however, that the promotion of unlawful activity be the sole motivation for a prohibited financial transaction; if that were the law, then defendants could escape liability for money laundering merely by reinvesting the proceeds of crime in a business that conducted both legal and illegal activity. In this case, Lifecare was engaged in illegitimate as well as legitimate business, and the evidence was sufficient for the jury

to conclude that the payments for rent and utilities were made at least in part to facilitate the illegitimate activity, the continued submission of the false claims. That showing suffices to support petitioner's conviction. See *United States* v. *Johnson*, 971 F.2d 562, 566 (10th Cir. 1992) (finding sufficient evidence of intent to "promote" a fraudulent scheme where the defendant used the fraud proceeds to pay his home mortgage and the fraudulent scheme was conducted from an office in the home).

The cases on which petitioner relies (Pet. 10) are not to the contrary. In *United States* v. *Jackson*, 935 F.2d 832 (7th Cir. 1991), the defendant was convicted under Section 1956(a)(1)(A)(i) of using drug proceeds to buy beepers, to buy a mobile phone, to make rent payments, and to write checks for cash. The court of appeals upheld his conviction as to the beepers, since there was evidence that they were used to further his drug activities; reversed his conviction as to the mobile phone, since there was no evidence that mobile phones played any role in the drug operation; and reversed his conviction as to the rent payments and checks, since those were merely "lifestyle" expenditures. *Id.* at 841. Accord *United States* v. *Torres*, 53 F.3d 1129, 1139 (10th Cir.) (reversing conviction for money laundering based on purchase of car, in absence of evidence that the car was bought for use in drug trafficking), cert. denied, 115 S. Ct. 2599, 116 S. Ct. 220 (1995). In this case, by contrast, the mortgage and utilities payments were not "lifestyle" or personal expenditures; they facilitated the business through which petitioner and her husband conducted their fraudulent scheme.

In *United States* v. *Heaps*, 39 F.3d 479 (4th Cir. 1994), the defendant provided drugs to friends without

requiring advance payment; the friends wired money orders to the defendant after they resold the drugs; and the defendant then had the money orders cashed and the cash placed in a box. The government argued in part that the transfer of the money orders "promoted" the unlawful activity by "complet[ing] the antecedent drug transaction." *Id.* at 485. The court of appeals rejected that theory, explaining that, "[w]ere the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually every sale of drugs would be an automatic money laundering violation as soon as money changed hands." *Ibid.* (emphasis omitted). In the instant case, unlike *Heaps*, the government's theory was not that the rent and utilities payments completed an antecedent transaction, but that they promoted future illicit activity by supporting the business used to carry on the fraudulent scheme. The decision below is therefore consistent with the proposition, endorsed in *Heaps*, that money laundering is "a separate crime from the underlying offense" (see Pet. 11).

Petitioner errs in suggesting (Pet. 12) that the court in this case gave a broader meaning to "promote" than was placed on that term by the courts in *United States* v. *Piervinanzi*, 23 F.3d 670 (2d Cir.), cert. denied, 115 S. Ct. 259, 267 (1994), *United States* v. *Cavalier*, 17 F.3d 90 (5th Cir. 1994), *United States* v. *Paramo*, 998 F.2d 1212 (3d Cir. 1993), cert. denied, 114 S. Ct. 1076 (1994), and *United States* v. *Montoya*, 945 F.2d 1068 (9th Cir. 1991). Those cases indicate that the government can satisfy the "promote" element of Section 1956(a)(2) without establishing that the laundering activity would further the commission of subsequent crimes. See, *e.g.*, *United States* v.

Piervinanzi, 23 F.3d at 681 (discussing *Cavalier*, *Paramo*, and *Montoya*). None of those decisions conflicts with the holding here (Pet. App. 12a), that "plowing the proceeds of the mail fraud back into the business," thus facilitating the commission of more crimes, satisfies the "promote" element.

b. Nor was the evidence insufficient to show that the funds involved in the pertinent transactions were "proceeds" or "criminally derived property." As the court of appeals pointed out, the government established the criminal derivation of the funds by showing the date and amount of petitioner's deposits of fraudulently obtained Medicaid checks in the Sovran account, any intervening transactions, and the date and amount of the charged withdrawals. Pet. App. 12a.

Petitioner argues that such proof is insufficient because not all the funds in the Sovran account at the time of the withdrawals had a criminal source; some were derived from legitimate activity. The courts of appeals have held, however, that when the funds involved in a financial transaction for money laundering are drawn from a source in which is commingled lawfully acquired and unlawfully acquired money, the government need not specifically trace the funds to the illegal activity. *United States* v. *Moore*, 27 F.3d 969, 976-977 (4th Cir.), cert. denied, 115 S. Ct. 459 (1994); *United States* v. *Johnson*, 971 F.2d at 570; *United States* v. *Jackson*, 935 F.2d at 840.

As the Fourth Circuit explained in *Moore*, "[m]oney is fungible, and when funds obtained from unlawful activity have been combined with funds from lawful activity into a single asset, the illicitly-acquired funds and the legitimately-acquired funds (or the respective portions of the property purchased

with each) cannot be distinguished from each other." 27 F.3d at 976-977. As a result, "it may be presumed in such circumstances * * * that the transacted funds, at least up to the full amount originally derived from crime, were the proceeds of the criminal activity or derived from that activity." *Id.* at 977. A contrary interpretation "would allow individuals to avoid prosecution simply by commingling legitimate funds with proceeds of crime," thereby "defeat[ing] the very purpose of the money-laundering statutes." *United States* v. *Johnson*, 971 F.2d at 570.

Decisions of other courts of appeals (see Pet. 13) are not to the contrary. In *United States* v. *Smith*, 46 F.3d 1223, 1236 (1st Cir.), cert. denied, 116 S. Ct. 176 (1995), the court observed that the government was able to trace the funds used in a financial transaction to a criminal act, which was held sufficient to support the money laundering conviction. That case, however, did not address a situation like this one, in which the account from which the funds were drawn contained commingled lawfully acquired and unlawfully acquired funds. *United States* v. *Dobbs*, 63 F.3d 391 (5th Cir. 1995), also did not involve such a situation. Although the money laundering convictions in that case were reversed because there was insufficient evidence that the financial transactions were intended to conceal the criminal source of the funds, the court there observed that "[t]he purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities." *Id.* at 397. *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), did not

involve the money laundering statute; that case concerned the government's effort to forfeit funds as proceeds traceable to prohibited narcotics transactions. The court held there that the government should have a "lenient burden of proof" in commingling cases, and observed that "few [commingling] cases will present facts that neatly match untainted deposits with withdrawals." *Id.* at 1160. The court concluded that the forfeiture statute applies to any "credit balance reflecting the cumulative results of deposits into and withdrawals from an account into which were deposited proceeds from drug sales." *Id.* at 1159.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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